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Elimination of Municipal Good Faith as a Defense under Section 1983: A New Hope of Recovery for Strip Search Victims - Owen v. City of Independence

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ELIMINATION OF MUNICIPAL GOOD FAITH AS A DEFENSE UNDER SECTION 1983: A NEW HOPE OF RECOVERY FOR STRIP SEARCH VICTIMS— *OWEN V. CITY OF INDEPENDENCE*

The scope and purpose of 42 U.S.C. § 1983[1] have been subjects of considerable litigation in federal courts.[2] The statute was designed to vindicate civil rights violations.[3] Implementation of local governmental policies inevitably affects many aspects of individuals' lives, occasioning civil rights violations section 1983 was intended to remedy and deter.[4] To fix governmental liability for these violations, courts have had to reconcile the plaintiff's right to protection under the statute with local governments' need for independence in their decision-making processes.[5]

The United States Supreme Court directly confronted the problem of whether municipal entities could be held liable under section 1983 for deprivations of constitutional guarantees in *Monroe v. Pape*.[6] In that case, the Court concluded that municipal corporations did not fall within the ambit of the statutory term "person," thereby immunizing municipalities from civil damage liability.[7] The Court later extended this immunity to suits seeking

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1. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

2. Federal jurisdiction for § 1983 actions is granted in 28 U.S.C. § 1343 (1976), which provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> . . .
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> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

See Aldinger v. Howard, 427 U.S. 1, 16 (1976).

3. *See* notes 23-27 and accompanying text *infra*.

4. Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 243 (1979) [hereinafter cited as Schnapper].

5. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 503 (1978) (plaintiff's right to damages for various unconstitutional acts by federal officials was outweighed by the necessity of official immunity for discretionary acts).

6. 365 U.S. 167 (1961). *See* note 33 *infra*.

7. 365 U.S. at 192.

injunctive relief,[8] rendering municipalities absolutely immune under section 1983.[9]

In *Monell v. New York City Department of Social Services*[10] the Supreme Court abrogated the *Monroe* municipal immunity doctrine. The *Monell* Court held that local governmental entities are "persons" under section 1983, directly liable for damages or subject to equitable remedies when a constitutional violation stems from their official policies or customs.[11] The Court limited municipal liability by refusing to hold local governmental entities responsible under the doctrine of respondeat superior, but failed to address the scope of immunities preserved, if any, by its ruling.[12] Afforded no guidance, most lower courts responded by granting municipalities a good-faith defense similar to that traditionally afforded public officials.[13] Municipal and public official immunity arising concurrently from one transaction produced situations in which plaintiffs were unable to find a defendant liable for even the clearest constitutional deprivation.[14]

The Supreme Court recently resolved this problem in *Owen v. City of Independence*[15] by eliminating municipal good faith as a defense to section 1983 actions.[16] The *Owen* Court reviewed relevant legislative history and highlighted the civil rights statute's dual remedial and deterrent purposes.[17] The Court maintained that this dual purpose must be implemented so as to safeguard the dignity of the statutorily protected constitutional rights.[18] Consequently, to avoid leaving civil rights violations unremedied because of

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8. City of Kenosha v. Bruno, 412 U.S. 507 (1973). *See* notes 41-43 and accompanying text *infra*.

9. Plaintiffs have alternatively stated direct fourteenth amendment causes of action against municipalities to redress violations of constitutional rights, but this theory has not uniformly been accepted among the jurisdictions. *See* notes 44-45 and accompanying text *infra*.

10. 436 U.S. 658 (1978) (§ 1983 action against the city of New York to recover backpay owed because of an official policy compelling pregnant employees to take unpaid leaves of absence before the time such leaves were required for medical reasons).

11. *Id.* at 690-701.

12. *Id.* at 691.

13. *See* notes 50-53 and accompanying text *infra*.

14. The preclusion of relief resulting from concurrent municipal and public official immunities is essentially the same problem caused by the *Monroe* immunity doctrine. *See* notes 36-39 and accompanying text *infra*.

15. 445 U.S. 622 (1980).

16. *Id.*

17. *Id.* at 635-36. In *Monroe*, the Supreme Court looked only to Congress' rejection of the Sherman amendment to determine whether municipalities should be immune under § 1983. 365 U.S. at 188. The Court was less myopic in *Monell*, looking further into the congressional debates surrounding the passage of § 1983. 436 U.S. at 673-82. In *Owen*, the Court again expanded its search, this time to include not only congressional intent, but also the common law traditions of immunity existing at the time of the statute's enactment. The Court reasoned that because municipal immunity was not established at that time, Congress would have given some overt indication had it intended the immunity to be part of the statute. 445 U.S. at 637. *See* notes 47, 50 & 66-67 and accompanying text *infra*.

18. 445 U.S. at 650-51.

concurrent immunities, the Court in *Owen* denied municipalities good-faith immunity in section 1983 actions.

Elimination of the municipal good-faith defense has changed the section 1983 litigation process, opening courthouse doors to plaintiffs formerly viewed as having an insurmountable obstacle to obtaining a remedy.[19] One immediate consequence of the *Owen* decision is an increased likelihood of recovery for the burgeoning number of plaintiffs alleging that their rights were violated by implementation of a municipal strip search policy.[20] Another consequence, however, is that the *Owen* holding, by failing to limit retroactive liability and allowing unanticipated judgments against municipalities, might substantially drain municipal resources necessary to perpetuate vital public services. Because the many pending strip search cases expose *Owen's* potential weaknesses, these cases could provide the first test of the practicality of the *Owen* municipal liability doctrine.[21]

DEVELOPMENT OF MUNICIPAL LIABILITY UNDER SECTION 1983

Scope and Purpose of Section 1983

The dual aims of the Civil Rights Act of 1871[22] were to provide a remedy for persons wronged by an abuse of power granted by authority of state law and to deter future abuse of such power.[23] Congress created this express federal remedy to enforce existing fourteenth amendment rights at the state and local levels.[24] The legislators viewed the damages remedy as a salient feature of any scheme designed to vindicate constitutional rights.[25]

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19. *See* notes 96-104 and accompanying text *infra*.

20. *See* notes 104-110 and accompanying text *infra*.

21. *See* notes 110-118 and accompanying text *infra*.

22. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified in scattered sections of 18 & 28 U.S.C.).

23. Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Congress originally acted because state and local authorities were unresponsive to constitutional violations resulting from racial and political conditions existing in the post-Civil War South. These authorities refused to provide remedies or enforce existing sanctions against Ku Klux Klan members and their political allies. CONG. GLOBE, 42d Cong., 1st Sess. 931 app., at 78 (1871) (remarks of Rep. Perry) [hereinafter cited as GLOBE app.].

24. GLOBE app., *supra* note 23, at 85 (remarks of Rep. Bingham). The Civil Rights Act of 1871 was originally a bill to enforce the provisions of the fourteenth amendment. The first of its four sections, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment. CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871) [hereinafter cited as GLOBE]. Sections 2, 3, and 4 were directed toward supressing Ku Klux Klan violence in the Southern states by creating new classes of federal crimes, broadening the President's authority to use the militia to combat Klan violence, and suspending the writ of habeas corpus under certain circumstances. GLOBE app., *supra* note 23, at 335-36. These three sections were hotly debated and each was amended before the bill was passed. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 665-66 (1978).

25. GLOBE app., *supra* note 23, at 216 (remarks of Sen. Thurman).

Section 1983, a recodification of section 1 of the 1871 Act, reflects the desire of the forty-second Congress "to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen."[26] To accomplish the remedial purpose of the Act, its language was to be given "the largest latitude consistent with the words employed. . . ."[27] This language undermines any interpretation of section 1983 that would result in unremedied constitutional deprivations and accords broad judicial authority to provide an injured plaintiff with an effective remedy.[28]

Section 1983 was intended to deter, as well as to remedy, constitutional violations.[29] To be effective, such deterrence must operate both when governmental policies are adopted and when they are implemented. Fear of monetary liability may alert municipal policy-makers to previously overlooked possibilities of constitutional deprivation resulting from their actions.[30] Further, liability for damages inhibits injurious conduct by creating an incentive for officials who doubt the lawfulness of contemplated actions to choose an alternative more protective of citizens' constitutional rights.[31]

Judicial Interpretation

In 1961, the Supreme Court ruled in *Monroe v. Pape*[32] that municipal corporations were immune from civil damage liability under section 1983.[33] Although the hardship worked by this decision on section 1983 plaintiffs was somewhat assuaged by subsequent decisions allowing limited forms of injunctive relief,[34] the Court steadfastly adhered to the damages immunity

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26. GLOBE, *supra* note 24, at 368 (remarks of Rep. Sheldon).

27. GLOBE app., *supra* note 23, at 68.

28. Schnapper, *supra* note 4, at 244.

29. *See* note 23 *supra*.

30. Owen v. City of Independence, 445 U.S. 622, 651-52 (1980). *See* Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (students suspended from school without procedural due process sought damages under § 1983); Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring) (§ 1983 suit for damages from a loss of liberty caused by unlawful prosecution).

31. 445 U.S. at 652.

32. 365 U.S. 167 (1961).

33. *Id.* at 187. Petitioners, six black children and their parents, claimed the invasion and subsequent search of their home without a warrant and the arrest and detention of Mr. Monroe without a warrant or arraignment constituted deprivations of their constitutional rights protected by § 1983. *Id.* at 170. The complaint alleged that the officers acted under color of the laws of the State of Illinois and the City of Chicago. *Id.* at 169. The Court did not reach the question of whether Congress was constitutionally empowered to hold municipalities liable for violations of individuals' rights, but reasoned that the forty-second Congress' antagonistic response to the Sherman amendment (imposing peace-keeping obligations on county and town organizations) contradicted petitioners' claims that municipalities were intended to be "persons" for purposes of § 1983. *Id.* at 190-91.

34. *See, e.g.*, Turner v. City of Memphis, 369 U.S. 350, 353-54 (1962) (injunction issued to restrain the city from maintaining a segregated restaurant in its municipal airport); Harkless v.

doctrine.[35] An academic controversy developed regarding the proper balance between the Supreme Court's pronounced doctrine of municipal immunity and the dual mandates of section 1983.[36] But lower federal courts, bound by stare decisis, followed the *Monroe* municipal immunity doctrine and neglected the remedial demands of section 1983.[37] Historically, public officials have been shielded from personal liability when a constitutional violation resulted from good faith performance of their official duty to implement municipal policy.[38] When *Monroe* extended immunity to the municipality whose unconstitutional policy caused the injury, the concurrence of public official and municipal immunities in the same transaction left many section 1983 violations unremedied.[39]

Subsequently, various lower courts attempted to circumvent *Monroe*, but the Supreme Court rejected their alternative theories based on section 1988,[40] on the doctrine of pendent party jurisdiction,[41] and on an equitable

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Sweeney Independent School Dist., 427 F.2d 319, 323 (5th Cir. 1970) (school district and its trustees were "persons" within the ambit of § 1983 where equitable relief was sought), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, 425 F.2d 1037, 1040 (10th Cir. 1970) (injunction issued prohibiting the city council from denying a building permit or zoning variance because of applicant's race). *See generally* Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. PA. L. REV. 389, 390 (1970). The Court later granted municipalities complete immunity from equitable relief under § 1983 as well. *See* note 42 *infra*.

35. *See* notes 40-42 and accompanying text *infra*.

36. The "root cause" of the immunity controversy in *Monroe* was the relationship between § 1983 and modern notions of federalism. States are sovereign entities and must be allowed to execute their sovereign functions free of excessive federal restraint. Nevertheless, there are no specific governmental roles wholly immune from federal preemption or restriction when a constitutional right is at issue. Note, *Local Governmental Entities No Longer Absolutely Immune Under Section 1983*—Monell v. New York City Department of Social Services, 28 DEPAUL L. REV. 429, 431 n.17 (1979) [hereinafter cited as *Monell* Note].

37. The lower courts, bound by stare decisis to follow the *Monroe* immunity doctrine, often denied compensation for the deprivation of fundamental rights. *See* Patrum v. City of Greensburg, 419 F.2d 1300, 1302 (6th Cir. 1969) (city immune under § 1983 in an action alleging unlawful arrest and physical injury inflicted by police officers), *cert. denied*, 397 U.S. 990 (1970); United States *ex rel.* Gettlemacher v. City of Philadelphia, 413 F.2d 84, 86 (3d Cir. 1969) (plaintiff denied recovery under § 1983 for improper medical treatment received while a state prisoner), *cert. denied*, 396 U.S. 1046 (1970). For an analysis of how *Monroe* frustrated the remedial and deterrent purposes of § 1983, see Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136 (1972).

38. *See* note 52 and accompanying text *infra*.

39. *See* cases listed in *Monell* Note, *supra* note 36, at 431-32 n.18.

40. Moor v. County of Almeda, 411 U.S. 693 (1973). The *Moor* plaintiff based his cause of action on 42 U.S.C. § 1988 (1970), which authorizes federal courts to apply state law remedies where the federal remedies do not adequately protect civil rights. He alleged that § 1983 was inadequate and asked the Court to apply a California law holding municipalities vicariously liable for torts committed by local officials. The Supreme Court rejected this argument, maintaining that § 1988 allows incorporation of a state remedy, but not a cause of action; rather, the cause of action must be traceable to the civil rights statutes. *Id.* at 702-05. Also, because § 1988 can only apply when the state remedy is consistent with the Constitution or other laws of the United States, municipal liability would not be proper as it is contrary to the Supreme Court's interpretation of § 1983 in *Monroe*. *Id.* at 707.

relief distinction.[42] In denying the equitable relief distinction, the Court granted municipalities immunity from equitable relief as well as from damage claims, rendering section 1983 suits against them virtually impossible.[43] To avoid an absolute bar of these suits against municipalities some lower courts bypassed section 1983 by allowing a direct fourteenth amendment cause of action to vindicate civil rights violations. This theory, based on a Supreme Court decision establishing federal question jurisdiction as a vehicle for damages and equitable relief from constitutional violations,[44] was not, however, uniformly accepted.[45]

Although *Monroe* involved a municipal corporation, immunity was granted to a county in *Moor* and extended to various other governmental entities. *See, e.g.*, Adkins v. Duval County School Bd., 511 F.2d 690, 691 (5th Cir. 1975) (school board); Garret v. City of Hamtramck, 503 F.2d 1236, 1249 (6th Cir. 1974) (city planning commission); Sykes v. State of Cal. Dept. of Motor Vehicles, 497 F.2d 197, 201 (9th Cir. 1974) (state agencies); Pressman v. Chester Township, 307 F. Supp. 1084, 1086 (E.D. Pa. 1969) (townships).

41. Aldinger v. Howard, 427 U.S. 1 (1976). The plaintiff filed a § 1983 action in federal court against a county and county officers for violation of her first, ninth, and fourteenth amendment rights. She also filed a state claim based on a state law holding the county vicariously liable for its officials' torts. She argued that the doctrine of pendent party jurisdiction obligated the federal court to hear both claims. *Id.* at 3-5. Recognizing that under *Monroe* a municipal body is not a "person" and is therefore not subject to suit under § 1983, the Court affirmed the District court's dismissal of the § 1983 claims against the county. The Court also held that the state law claim was properly dismissed because pendant jurisdiction does not extend to joinder of a party in respect to whom no independent federal jurisdiction exists. *Id.* at 16-17. *See generally* Comment, *Pendent and Ancillary Jurisdiction: Towards a Synthesis of the Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).

42. City of Kenosha v. Bruno, 412 U.S. 507 (1973). Plaintiffs sought declaratory and injunctive relief rather than damages under § 1983 for an alleged due process violation. *Id.* at 508. The Supreme Court rejected this relief-based distinction, extending the *Monroe* civil damages immunity principle to suits for injunctive relief. The majority found no evidence to suggest that a bifurcated application of the term "person" in § 1983 was intended in *Monroe* or in the legislative history. *Id.* at 513.

43. *Id. See* Levin, *The Section 1983 Municipal Immunity Doctrine*, 68 GEO. L.J. 1493, 1494-1519 (1977); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1190-97 (1977).

44. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393 (1971). Plaintiffs used 28 U.S.C. § 1331(a) (1970) (federal question jurisdiction) to initiate a federal cause of action for damages resulting from a *fourth* amendment violation.

Realizing the futility of § 1983 claims against municipalities after *Monroe* and City of Kenosha v. Bruno, 412 U.S. 507 (1973), plaintiffs bringing actions in lower federal courts analogized a direct *fourteenth* amendment cause of action from an expansive reading of *Bivens*. This theory afforded only a partial solution to the § 1983 municipal immunity problem. Many plaintiffs undoubtedly were frustrated by their inability to meet the $10,000 jurisdictional amount required by § 1331(a).

45. *Compare* Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975) (sterilization statute challenged as violative of thirteenth and fourteenth amendment rights in a suit against a county) *and* Hostrop v. Board of Junior Colleges, 523 F.2d 559, 566-67 (7th Cir. 1975) (action against a college board for wrongful dismissal in violation of due process), *cert. denied*, 425 U.S. 963 (1976) *and* Hander v. San Jacinto Junior College, 522 F.2d 204, 205 (5th Cir. 1975) (first and

In 1978, the Supreme Court finally provided a direct federal cause of action under section 1983 for those whose civil rights are violated by the customs or policies of local governmental entities. In *Monell v. New York City Department of Social Services*,[46] the Court's review of the history of section 1983[47] revealed legislative intent to hold local governmental entities liable for damages as well as for equitable relief when constitutional violations resulted from governmental policy or custom.[48] Although *Monell*

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fourteenth amendment claims against a school district for wrongful dismissal) *with* Kostka v. Hogg, 560 F.2d 37, 42 (1st Cir. 1977) (fourteenth amendment analogy rejected in an action against a municipality whose police officer shot and killed decedent in the course of an arrest) *and* Farnsworth v. Orem City, 421 F. Supp. 830, 831 (D. Utah 1976) (court granted motion to dismiss a fourteenth amendment action against a municipality because the *Bivens* analogy was inappropriate) *and* Smetanka v. Borough of Ambridge, 378 F. Supp. 1366, 1377 (W.D. Pa. 1974) (rejection of *Bivens* analogy prevents borough liability for first and fourteenth amendment violations). *See also* Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits*, 16 DUQ. L. REV. 373, 381-96 (1977-78).

46. 436 U.S. 658 (1978).

47. *Id.* at 687-89. The Court's analysis of the legislative history of § 1983 in *Monell* was in greater depth than that in *Monroe*. In the latter case, the Court inferred intent to grant municipalities absolute immunity under the Civil Rights Act of 1871 from the forty-second Congress' rejection of the Sherman amendment. That amendment originally proposed vicarious municipal liability for tortious acts of violence committed with intent to deprive a person of any guaranteed right, regardless of whether the wrongdoers were acting under color of state law. 365 U.S. at 188. It was subsequently revised to render the municipality vicariously liable only when the judgment against the private defendant went unsatisfied, but was again rejected by Congress, presumably because the federal government could not constitutionally impose peace-keeping obligations on local governments. 436 U.S. at 673-76. The *Monell* majority relied upon passages from the congressional debates to differentiate between the Sherman amendment's imposition of a duty on a municipality to keep the peace and the enforcement of an existing duty to secure federal rights. *Id.* at 673-82. The majority also relied upon the Dictionary Act of 1871, passed only a few months before § 1983, and other sections of the congressional debates calling for broad construction of § 1983, to justify including municipalities within the term "person" under the statute. *See Monell* Note, *supra* note 36, at 437-38.

48. 436 U.S. at 690. Although the exact parameters of "policy" and "custom" were left open in *Monell*, Justice Brennan observed that liability could be imposed for "deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-91. Just as custom can be interpreted to suggest the existence of a policy, it can also be interpreted as evidence that a formal enactment is not the true policy of the municipality. *See* Washington Mobilization Comm'n v. Cullinane, 566 F.2d 107, 116, 127 (D.C. Cir. 1977) (narrow construction of a city ordinance rendered it constitutional, but police practice of making arrests in a manner inconsistent with that construction was found to be the city's policy). Subtle encouragement or toleration of constitutional deprivations could also result in an inference of official policy. *See* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (deliberate indifference to a prisoner's serious illness or injury indicated unconstitutional policy actionable under § 1983); Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir. 1978) (police department's failure to discipline officers for illegal searches indicated policy approving of them). *See generally* Schnapper, *supra* note 4; Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979).

significantly reduced confusion in the lower courts by eliminating the *Monroe* absolute immunity doctrine, it nevertheless left unanswered the major questions of whether any municipal immunity remained and, if so, from what authority such immunity stemmed.[49]

The Supreme Court has recognized that section 1983, on its face, admits no immunities.[50] The statute has been interpreted, however, as including different forms of immunity. For instance, in section 1983 suits the Supreme Court has upheld absolute and qualified immunity for public officials acting in their official capacities.[51] Recently, many lower courts have extended a qualified immunity to municipal entities based upon good faith.[52] This trend runs contrary to many past decisions that tended to restrict, rather than to expand, the doctrine of municipal immunity.[53] Indeed, granting municipal good-faith immunity leaves numerous violations of civil rights unremedied, a result the *Owen* Court found inconsistent with the remedial purpose of section 1983.

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49. 436 U.S. at 701. The *Monell* Court's only limitation on its holding was that local governmental entities cannot be held liable under § 1983 solely on a respondeat superior theory. *Id.* at 691.

50. Owen v. City of Independence, 445 U.S. 662, 635 (1980). The unqualified language of the statute neither creates nor allows any type of immunity or defense. It states that "every person" who under color of state law or custom deprives one of his constitutional rights shall be liable. This expansive reading is endorsed by the statute's legislative history. Imbler v. Pachtman, 424 U.S. 409, 417-19 (1976).

51. Butz v. Economou, 438 U.S. 478, 507 (1978) (qualified immunity to executive officials); Procunier v. Navarette, 434 U.S. 555, 561 (1978) (qualified immunity to prison officials); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (absolute immunity to state prosecutors); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (qualified immunity to superintendents of state hospitals); Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (qualified immunity to school administrators and school board members); Scheuer v. Rhodes, 416 U.S. 232, 247-49 (1974) (qualified immunity to state executive officials); Pierson v. Ray, 386 U.S. 547, 553-555 (1966) (absolute immunity to federal and state judiciaries and good-faith qualified immunity to police officers); Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (absolute immunity to Congressmen).

52. Although the legitimacy of a municipal good-faith defense in § 1983 actions was questionable after *Monell*, most jurisdictions have recognized the validity of that defense. *E.g.*, Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979) (county strip search policy enacted in good faith); Owen v. City of Independence, 589 F.2d 335, 338 (8th Cir. 1978) (good faith policy allowing discretionary discharge of public employees); Ohland v. City of Montpelier, 467 F. Supp. 324, 340 (D. Vt. 1979) (good faith discharge of public employee). *Contra* Schuman v. City of Philadelphia, 470 F. Supp. 449, 464 (E.D. Pa. 1979) (municipal good faith was no defense to an action alleging wrongful dismissal of a police officer).

53. 18 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 104 (3d ed. 1977). The underlying principle of the sovereign immunity doctrine was deemed "contrary to the basic concept of torts that liability follow negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive. . . ." *Id.* (footnotes omitted). Consequently, courts attempted to temper the injustice of the sovereign immunity doctrine by means of the "governmental-proprietary distinction," granting immunity in the exercise of governmental functions, but not in the performance of non-governmental (proprietary) functions. This distinction proved confusing and unworkable. *Id.* at 104-106.

THE OWEN DECISION

Factual Background

George Owen, former police chief of Independence, Missouri, brought suit against the City of Independence, the city manager, and the city council seeking declaratory and injunctive relief for alleged violations of his fourteenth amendment rights.[54] He had been discharged pursuant to general provisions of the city charter[55] after an investigation of the city police department disclosed evidence of mismanagement. He was given no reasons for his dismissal, and his requests for a name-clearing hearing were denied.[56] At the same time, however, the city council issued a statement to the press and the county prosecutor charging Owen with gross incompetence and dishonesty.[57] The statement appeared on the front page of the local newspapers, but a grand jury convened to examine the allegations found insufficient evidence to warrant a criminal charge.[58]

Owen brought suit under section 1983 and the fourteenth amendment in the district court for the Western District of Missouri. The district court heard only the fourteenth amendment claim and held that there had not been a denial of due process.[59] The United States Court of Appeals for the Eighth Circuit reversed, finding that the statement made at the time of discharge violated the appellant's liberty guaranteed by the fourteenth amendment.[60] The Supreme Court granted certiorari, but remanded the case for rehearing in light of its *Monell* ruling which, by overruling *Monroe*, made possible section 1983 actions against municipalities.[61] On remand, the

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54. 445 U.S. at 630.

55. Section 3.3(1) of the city's charter grants the city manager sole authority to "[a]ppoint, and *when deemed necessary for the good of the service*, lay off, suspend, demote, or remove all directors or heads of administrative departments and all other administrative officers and employees of the city. . . ." *Id.* at 625 n.2 (emphasis added).

56. *Id.* at 629.

57. The statement regarding the investigation was prepared by Councilman Roberts and adopted by the City Council:

> The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the prosecutor for presentation to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities."

Brief for Petitioner at 3, Owen v. City of Independence, 445 U.S. 622 (1980). The full text of the statement is set forth in the brief's appendix at 24-25.

58. 445 U.S. at 629-30.

59. 421 F. Supp. 1110, 1127 (W.D. Mo. 1976).

60. 560 F.2d 925, 941 (8th Cir. 1977).

61. 438 U.S. 902 (1978).

Eighth Circuit recognized a violation of section 1983, but held that the city, acting in good faith, was entitled to qualified immunity under the statute.[62] The Supreme Court again granted certiorari to decide the precise issue of whether the city was entitled to good-faith immunity when it had violated rights guaranteed by section 1983.[63]

The Majority Opinion

The *Owen* Court examined both the legislative history of section 1983 and the common law traditions of immunity surrounding its enactment. The Court also weighed public policy to determine the propriety of a good-faith defense for municipal corporations. Justice Brennan, writing for a five justice majority,[64] held that because the dual remedial and deterrent purposes of the statute would be defeated if municipalities were allowed to allege their good faith as a complete defense to section 1983 actions, the defense could not have been intended under the statute.[65] The Court reasoned that although section 1983 on its face affords no immunities, the forty-second Congress intended to incorporate into the statute those immunities existing in the common law at the time of its enactment.[66] Unlike public official immunity, municipal good-faith immunity did not exist at the time of the statute's enactment; the Court therefore refused to read it into the statute.[67] The Court also held inapplicable the traditional doctrines of "sovereign immunity" and "discretionary immunity" which have protected municipalities against tort liability while exercising governmental functions and making discretionary decisions.[68]

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62. 589 F.2d at 338.

63. 444 U.S. 822 (1979).

64. Justices Blackmun, Brennan, Marshall, Stevens and White concurred in the majority opinion.

65. 445 U.S. at 622.

66. *Id.* at 637. The Court has on several occasions found a tradition of immunity so rooted in the common law that "Congress would have specifically so provided had it wished to abolish the doctrine." Pierson v. Ray, 386 U.S. 547, 555 (1967). For examples of these immunities, see note 5 *supra*.

67. 445 U.S. at 644. When § 1983 was enacted, municipalities were not liable for all tortious conduct, but they did not enjoy the type of good-faith immunity extended to them by the Court of Appeals. *See, e.g.*, Thayer v. City of Boston, 36 Mass (19 Pick.) 511, 516-17 (1837) (municipality liable in tort for property damage despite a good-faith belief that the actions were lawful; Town Council of Akron v. McComb, 18 Ohio 229, 231-32 (1849) (municipal corporation liable for property damage done without malice or negligence); Squiers v. Village of Neenah, 24 Wis. 593 (1869) (city liable for good-faith trespass performed for the lawful benefit or advantage of the pubic). For a general discussion of municipal tort liability at that time, see T. SHERMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 120 (1869).

68. The doctrine of sovereign immunity, holding municipalities immune from tort liability in their exercise of governmental functions, was held inapplicable because Congress, the supreme sovereign in matters of federal law, had abrogated the municipalities' immunity by enactment of a statute—§ 1983—making these entities amenable to suit. 445 U.S. at 647 & n.30. Any trace of sovereign immunity derived by the municipality was abolished when the forty-second Con-

Next, the Court examined the policies underlying public officials' good-faith defense and found those policies insufficient to compel extension of good-faith immunity to local governmental entities.[69] The Court recognized added incentive to impose liability "when the wrongdoer is the institution . . . established to protect the very rights it has transgressed."[70] Also, whereas a judgment against an official in his or her individual capacity might be financially devastating, the Court noted that a municipality held liable can spread the loss among its taxpayers.[71] The Court stated that municipal liability, unlike public official liability, does not inhibit performance, but rather acts as an incentive for greater care in incorporating constitutional mandates into local statutes.[72]

The majority realized that to safeguard the dignity of the rights guaranteed by section 1983 a remedy must exist for every violation of that statute.[73] Therefore, they removed the barrier to recovery imposed by concurrent immunities and rendered the good-faith defense unavailable to municipal entities. The Court also recognized that its denial of a good-faith defense will deter harmful conduct by reminding policy-making officials of the municipality's potential liability for irresponsible policies.[74] In addition, the new standard of municipal responsibility will minimize unintentional infringements of protected rights by threatening liability when poorly drawn statutes result in unconstitutional injury.[75]

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gress included local governmental entities within the statutory term "person." *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 (1978). The second traditional doctrine, immunizing discretionary decision-making, was also rejected by the Court. This doctrine prevented courts from substituting their own judgment on matters within the discretion of another branch of government. Judicial inquiry is only appropriate "[w]hen there is a substantial showing that the exertion of state power has overridden private rights secured by the federal Constitution. . . ." Sterling v. Constantin, 287 U.S. 378, 398 (1932). The *Owen* Court made it clear that "a municipality has no 'discretion' to violate the Federal Constitution." 445 U.S. at 649.

69. *Id.* at 652-54. The doctrine of official immunity rests on two "mutually dependent" rationales:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). In Wood v. Strickland, 420 U.S. 308 (1975), the Court formulated a third justification for official immunity: the fear that threat of personal liability might deter citizens from holding public office. *Id.* at 320.

70. 445 U.S. at 651.

71. *Id.* at 654-56.

72. *Id.*

73. *Id.* at 650-51.

74. *Id.* at 651-52.

75. *Id.*

CRITICISM

In *Owen*, the Supreme Court conducted a focused investigation of the legislative history of section 1983 to answer the immunity question left open in *Monell v. New York City Department of Social Services.*[76] This study revealed that municipal good-faith immunity was not intended under the statute.[77] The Court's elimination of the good-faith defense renders municipalities liable when their policies result in deprivation of constitutional rights. This fulfills the remedial demands of section 1983 and represents another important step toward protecting cherished constitutional rights.

Justice Powell's dissenting opinion[78] exposed two practical weaknesses of the *Owen* decision: the potential for retroactive liability for constitutional violations that were not such when they occurred,[79] and the financial inability of some smaller municipalities to spread judgment losses.[80] These interrelated practical considerations were belittled by the Court as it sought the strongest possible implementation of section 1983's combined remedial and deterrent purposes. In spite of the fact that the *Owen* Court's decision has properly provided a necessary remedy for victims of unconstitutional conduct, future applications of the *Owen* holding may be limited by its practical and economic ramifications.

In emphasizing implementation of the dual purpose of section 1983, the majority failed to realistically address the two potential weaknesses of the *Owen* decision. The first weakness is that the decision, by eliminating the good-faith defense, unfairly allows retroactive liability for acts performed before the municipal entity could or should have known it was treading upon a constitutional right.[81] This retroactive liability imposes upon policy-making officials seeking to avoid liability the onerous task of predicting future Supreme Court interpretation of constitutional law. Although the Court conceded that constitutional developments cannot always be foreseen, it

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76. 436 U.S. 658 (1978). *See* note 49 and accompanying text *supra*.

77. 445 U.S. at 635-38.

78. Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice Rehnquist joined in the dissent.

79. 445 U.S. at 671-75 (Powell, J., dissenting).

80. *Id.* at 670.

81. The good-faith defense shielded municipalities from liability for violations they could not possibly have predicted. The dissenters argued that because the requirement of a name-clearing hearing when conditions surrounding termination leave defamatory impressions was first announced in Board of Regents v. Roth, 408 U.S. 564, 572-75 (1972), ten weeks *after* Owen was discharged, the city was acting in good faith and should not be held liable for its inability to predict the Court's decision in *Roth*. Forcing local governments to foresee constitutional developments is particularly disturbing because the five Justices constituting the *Owen* majority recognized a violation, but the four dissenters contended that none had occurred. 445 U.S. at 658. This foreseeability problem was also considered in *Monell*. 436 U.S. at 714-17 (Rehnquist, J., dissenting).

stressed that it is fairer to spread judgment losses among the taxpayers than to allow those losses to be borne solely by the victims whose rights, albeit newly recognized, have been violated.[82] The second weakness of the *Owen* decision is the potentially disastrous economic impact of substantial unanticipated monetary liability, particularly with respect to many smaller municipalities with limited financial resources.[83] Depleting municipal funds by imposing retroactive liability may render some municipalities unable to perform vital public services.[84]

Two methods of limiting retroactive liability should be considered: municipal liability insurance and judicial control of retroactive suits through the statute of limitations. There will be a formidable insurance problem after *Owen* because a municipality cannot accurately anticipate when the implementation of its policies will result in a constitutional deprivation.[85] Even if every precaution is taken to determine the constitutionality of a given policy, the local government will be liable for injury caused by the policy if a court later declares it unconstitutional. This increased risk will undoubtedly cause increases in the cost of liability insurance.[86] Small municipalities will be faced with the dilemma of having to choose between insuring at great cost, or foregoing insurance and risking substantial monetary judgments. Although larger municipalities sometimes self-insure by creating special judgment funds,[87] it seems unlikely that smaller municipalities could afford to finance such programs.[88]

Furthermore, municipalities formerly used the good-faith defense to avoid liability for actions taken before a policy was declared unconstitutional.[89] Because *Owen* eliminated this defense, the applicable statute of limitations becomes significant in curtailing municipal responsibility for past actions.

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82. 445 U.S. at 654-55.

83. *Id.* at 670 (Powell, J., dissenting).

84. Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 958 (1976).

85. Insurance companies characteristically analyze statistics, such as the frequency and severity of loss, and then calculate a premium reflecting the actuarially fair value of the risk plus administrative expenses plus a margin of profit. The insurer must have accurate data to determine the actuarial value of the risk. INSTITUTE FOR LOCAL SELF GOVERNMENT, PUBLIC AGENCY LIABILITY 34 (1978) [hereinafter cited as PUBLIC AGENCY LIABILITY].

86. Insurance companies compensate for increased risk due to an imprecise actuarial basis to judge governmental liability by increasing premiums or, in some cases, refusing to underwrite municipal insurance. *Id.* at 36-37.

87. *See, e.g.*, ILL. REV. STAT. ch. 24, § 8-1-16 (1977) (authorizing cities with populations of 500,000 or more to levy a judgment tax to net up to $4,500,000 annually). The City of Chicago insures itself with this judgment tax fund. For a complete discussion of public entity self-insurance, see PUBLIC AGENCY LIABILITY, *supra* note 85, at 95-130.

88. PUBLIC AGENCY LIABILITY, *supra* note 85, at 48. One proposal to enable small municipalities to self-insure is a "pooling agreement" whereby several entities share self-insurance costs and responsibilities. *Id.* at 123. It is not clear, however, whether state laws will allow this arrangement. *Id.* at 124.

89. *See* notes 95 & 99-103 and accompanying text *infra*.

When a relevant federal statute prescribes no limitations period, federal courts apply the statute of limitations period of the forum state.[90] Most federal courts first characterize the violation, and then apply the state statute of limitations of the substantive offense most closely resembling the alleged violation.[91] A progressive approach was taken in a recent court of appeals decision[92] that distinguished section 1983 violations from state torts and, noting the gravity of such statutory violations, granted a more plaintiff-oriented five-year statute of limitations.[93] This expanded period increases the potential number of retroactive suits against municipalities and correspondingly increases unanticipated liability.

By incorporating section 1983's remedial demands, the *Owen* majority has assured recovery for civil rights violations, recognizing that municipalities can spread this loss with municipal assets. Although a single section 1983 judgment may be insignificant compared to other municipal expenses,[94]

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90. Runyon v. McCrary, 427 U.S. 160, 179 (1976); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914); Duncan v. Nelson, 466 F.2d 939, 941 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972). *See* 42 U.S.C. § 1988 (1976).

91. *See* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1795-96 (1980) (absence of statute of limitations and tolling rules under § 1983 allowed borrowing of New York tolling rules not inconsistent with federal law); Occidental Life Insurance Co. v. EEOC. 432 U.S. 355, 368 (1977) (California general one-year limitation period not borrowed because its application would not comport with the underlying policies of Title VII of the Civil Rights Act of 1964); Runyon v. McCrary, 427 U.S. 160, 179-82 (1976) (Virginia two-year statute of limitations for "personal injury" applied to an action alleging racial discrimination in violation of 42 U.S.C. § 1981 (1970)); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 705 (1966) (Indiana six-year statute of limitations on contract actions applied in an action brought under § 301 of the Labor Management Relations Act of 1947).

92. Beard v. Robinson, 563 F.2d 331, 332 (7th Cir. 1977). Plaintiff, as administratrix of the decedent's estate, brought an action against the Federal Bureau of Investigation alleging unlawful search, abduction, and infliction of physical injury upon the decedent in violation of his civil rights.

93. *Id.* at 337-38. The defendant argued that the state's two-year statute of limitations for personal injury, false imprisonment, and abduction should apply. The court of appeals, however, ruled that the state's tort limitation period did not apply. It classified the violation as "statutory" rather than a common law tort, and applied the longer general statute of limitations. *Id.* at 334-38.

94. Attorneys for Petitioner presented this comparison:

> City officials regularly make decisions which, if wrong, may impose substantial costs on the city treasury. Public officials fire employees every day even though they know that the city will have to pay for their action if a civil service commission or state court or grievance panel finds that the firing was unjustified or procedurally improper. City officials build airports knowing that inverse condemnation suits could cost the city hundreds of thousands of dollars. Selection of the wrong contractor for a public project, or of a less comprehensive form of insurance for public buildings, or of one rather than another date to issue municipal bonds can impose costs on a municipality that would dwarf the cost of *a judgment* under § 1983.

Brief for Petitioner at 19-20 (emphasis added).

Owen's elimination of the municipal good-faith defense could spawn a series of section 1983 suits imposing liability for actions implementing a custom or policy that formerly fell unquestionably within the proper scope of governmental behavior.[95] The strip search cases are of this nature.

IMPACT OF *OWEN*

Persons denied civil rights protected by section 1983 can now sue local governmental entities directly for legal and equitable relief without fear that a municipality's allegation of good faith will bar recovery. Elimination of the good-faith defense significantly changes the process for vindicating constitutional rights, a change best illustrated by considering the strip search cases brought under section 1983 pending before federal courts across the country. The courts' ultimate rulings on strip search policies, adopted by municipalities of all sizes, may become the vehicle for assessing the practicality of the *Owen* decision.

Impact on the Civil Rights Litigation Process

Before *Owen*, recognition of a section 1983 violation in the first phase of the litigation process did not guarantee recovery.[96] Instead, courts automatically proceeded to the second phase in which they would assess whether the municipal policy or custom was enacted in good faith.[97] The lower courts recognizing the good-faith defense[98] judged the municipal entity's actions by the same objective and subjective standards applicable to public officials.[99]

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95. In Schuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979), public officials violated an evolving privacy right. Because that right had not yet evolved, the court allowed a good-faith defense for the public officials who were unaware their actions were unconstitutional. Nevertheless, the municipal entity was denied the same protection and was held liable for injury flowing from its policy, although newly declared unconstitutional. *Id.* at 462-464.

96. Those jurisdictions recognizing the good-faith defense protected municipalities from liability for their constitutional violations resulting from a good-faith policy or custom. *See* note 52 *supra*.

97. Although good faith is an affirmative defense, its sheer strength makes it one that is automatically pleaded, at least in the alternative, whenever it could apply. In fact it was so automatic that courts began to require plaintiffs to allege bad faith in anticipation of a public official's assertion of a good-faith defense. The Supreme Court corrected this erroneous allocation of the burden of pleading subsequent to *Owen* by ruling that a § 1983 plaintiff is not required to allege bad faith to state a claim for relief, but rather the burden is on the defendant to plead good faith as an affirmative defense. Gomez v. Toledo, 100 S. Ct. 1920, 1923-24 (1980).

98. *See* note 52 *supra*.

99. Both objective and subjective good faith must be proven to claim the defense. Wood v. Strickland, 420 U.S. 308, 321-22 (1975). The objective element denies immunity if "the constitutional right allegedly infringed [by the defendants] was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." Procunier v. Naverette, 434 U.S. 555, 562 (1978). The subjective element of the test denies immunity if the defendant acted with "malicious intent to deprive the plaintiff of a constitutional right or to

If a municipality acted in bad faith, liability would attach and the appropriate legal or equitable remedy would be enforced. Good faith in both the enactment and implementation of the policy completely immunized a municipality from liability despite its violation of the individual's rights. This process allowed abuse of the defense where the city enacted a policy in good faith but used it for a malicious purpose. If the plaintiff was unable to prove malice, the good-faith enactment alone could warrant extending the defense to the municipal defendant.[100] The third phase of the litigation process was an analysis of the municipality's conduct to determine whether punitive damages should attach.[101]

The post-*Owen* litigation process will assume two phases: a determination of whether a violation has resulted from municipal custom or policy, and an analysis of whether punitive damages should be awarded. But now, because the good-faith defense for municipalities has been eliminated, any finding of deprivation will be compensated to the extent of the plaintiff's actual injury.[102] Whereas municipal good faith would have precluded recovery be-

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cause him 'other injury.' " *Id.* at 566. The subjective standard is similar to the standard used to determine whether punitive damages should attach. *See* note 101 *infra*.

100. There are hypothetical situations in which the city could find a "loophole" allowing it to trample upon constitutional rights without liability. It can fire an undesirable employee under a policy it believes in good faith to be constitutional, but its ulterior motive for the discharge may be malicious. The city can prove that it enacted this policy in good faith and allege that it relied on the constitutionality of the policy at the time of firing. This might persuade the trier of fact that the municipality acted in good faith, constituting a complete defense to the suit. The plaintiff might not be able to obtain proof that the city acted with malice. If the policy allows, as did the Independence City Charter, discretionary dismissal for the good of the department, *see* note 56 *supra*, the city could conceal the malice behind its discretionary powers and general allegations of the employee's incompetence. Although the city maliciously deprived the employee of his constitutional rights, it nevertheless escapes liability through cosmetic fulfillment of the subjective element of the good-faith defense.

101. The leading case authorizing punitive damages for § 1983 violations in "proper" circumstances is Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (punitive damages not awarded because the district court found defendants did not act with malicious intent to deprive plaintiffs' constitutional rights or do other injury). *Carey's* validity was reaffirmed recently in Carlson v. Green, 446 U.S. 14, 22 (1980). Federal courts of appeals have allowed recovery of punitive damages in § 1983 actions even if state law would not have permitted the award. *See* Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968) (though Massachusetts normally disallowed punitive damages, they were allowed in this § 1983 action to futher a uniform remedy under the statute), *cert. denied*, 393 U.S. 940 (1968); Basista v. Weir, 340 F.2d 74, 87 (1965) (federal common law allowing punitive damages without alleging compensatory damages takes precedence over Pennsylvania law making recovery of punitive damages contingent on proof of actual injury). For discussions of the problems of fashioning damage awards in § 1983 actions, see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part 1*, 60 VA. L. REV. 1, 55-66 (1974); Yudah, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1366-83 (1976); and Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1023-35 (1967).

102. Owen v. City of Independence, 445 U.S. 622, 657 (1980). In Maine v. Thiboutot, 100 S. Ct. 2502 (1980), the Supreme Court held that a denial of welfare benefits claimed under the Social Security Act violated rights guaranteed by § 1983. The Court stated that the plain lan-

fore *Owen*, the mere existence of a violation now mandates recovery. This eliminates the potential for abuse of the defense which stemmed from a plaintiff's inability to prove malice.[103] The municipality's motives are still analyzed, however, because good or bad faith is some evidence of malice in determining punitive damages. Because liability under the first phase of this process compensates only for actual injury, punitive damages may assume increased importance in adjusting liability for the total transaction.

The change in the litigation process will accomplish the remedial and deterrent purposes of section 1983. When there is a violation there will now be a remedy. This higher standard of liability also acts as an effective deterrent for those who may doubt the constitutionality of their proposed actions. In addition, it protects against unintentional injuries by forcing statutes to be more carefully drawn; so carefully, in fact, that superhuman insight may be required to totally avoid liability. But this, the Supreme Court implied, is the price for protecting important civil rights.[104] Only future practical experience will prove whether this is the most efficient balance of the competing interests; however, the strip search cases are illuminating in this regard.

Impact on Strip Search Cases

The Supreme Court's decision in *Owen* has given new hope for recovery to individuals whose dignity was intruded upon by a demeaning municipal practice called a strip search.[105] Victims of this practice formerly considered their chances of obtaining a judicial remedy nonexistent because of the good-faith immunities afforded municipalities and police officers, coupled with the Supreme Court's silence on the propriety of strip searches at the time of arrest.[106] Two weeks after the *Owen* decision, however, the Supreme Court remanded *Sala v. County of Suffolk*,[107] a case alleging that a county's strip

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guage of § 1983, to protect "rights . . . secured by the Constitution and laws," indicates that the statute is to apply not only to civil rights or equal protection laws, but also to other federal statutes protecting rights denied under color of state law. *Id.* at 2505-06. Although the jurisdictional counterpart to § 1983, 28 U.S.C. § 1343, grants federal jurisdiction in actions involving only equal rights or civil rights claims, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 620-23 (1979), the *Thiboutot* Court impliedly recognized jurisdiction over § 1983 "and laws" actions under 28 U.S.C. § 1331(a) (subject to satisfaction of the $10,000 jurisdictional amount requirement) and in the state courts. 100 S. Ct. at 2506 & n.6.

103. *See* notes 99-100 and accompanying text *supra*.

104. 445 U.S. at 654-56.

105. The strip search is an investigative procedure usually including visual inspection of the genital and anal areas. Sometimes those cavities are probed, often with an ungloved hand. Police contend that this procedure is necessary and often results in discovery of concealed drugs or weapons. Tybor, *Strip Searches Under Fire*, Nat'l L.J., May 5, 1980, at 8, col. 1 [hereinafter cited as Tybor].

106. The Supreme Court has ruled that strip searches of prisoners after contact visits with outsiders is acceptable, but has limited this decision to prison settings. Bell v. Wolfish, 441 U.S. 520, 558-60 (1979).

107. 446 U.S. 903 (1980) (remanded). In October of 1979, the Supreme Court denied petitioner Sala's motion to consolidate with *Owen*. 444 U.S. 923 (1979).

search policy violated section 1983, for further consideration by the Court of Appeals for the Second Circuit in light of *Owen*.[108] A few days later, the Court of Appeals for the Seventh Circuit affirmed a district court decision declaring unconstitutional a county policy permitting the strip search of a woman arrested for speeding.[109] Such judicial action presages a more realistic chance to recover under section 1983 for unconstitutional injury due to a municipal strip search policy.

National attention surrounding this controversial policy has encouraged a nationwide proliferation of lawsuits[110] which, if brought under a section 1983 theory, will be adjudicated using the post-*Owen* two-phase process. The lower courts' interpretation of the specific offense in the first phase of that process will be the true test of the impact of the *Owen* decision. Because the Supreme Court, when it remanded *Sala*, chose not to decide the constitutionality of strip searches at the time of arrest, lower courts are free to weigh many factors, including the effect of section 1983 damage judgments on municipal fisc. These courts are also able to shape the substantive constitutional violation to accommodate those factors. If strip searches are declared unconstitutional per se, *Owen* mandates recovery for every such violation to the extent of actual injury.[111] It is more likely, however, that courts will follow the Seventh Circuit's narrow holding and declare strip searches unconstitutional only when performed in connection with petty offenses.[112] The scope of the offense, once determined, will dictate the financial burden on municipalities. Even the narrowest of interpretations, however, could result in substantial section 1983 judgments because municipalities now are unable to allege as a defense their good-faith belief in the policy's constitutionality.

In *Sala*, the Supreme Court also avoided addressing the propriety of retroactive liability.[113] The previous Second Circuit decision in that case predicted the constitutional invalidity of the strip search policy but allowed a good-faith defense, noting that municipalities could not be faulted for adopting the policy.[114] The court urged that prospective application of this new

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108. The plaintiff was strip searched after she voluntarily appeared in response to a warrant issued for failure to heed a misdelivered summons. The Second Circuit did not decide the constitutionality of the strip search policy, but upheld good-faith immunity for the municipality. Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979).

109. Tinetti v. Wittke, 620 F.2d 160, 160-61 (7th Cir. 1980) (per curiam).

110. Tybor, *supra* note 105, at 8, col. 1.

111. 445 U.S. at 657.

112. 620 F.2d at 160. The civil rights considerations of the strip search are separate from the fourth amendment issues. Nevertheless, the Supreme Court could declare the whole procedure unconstitutional considering the dignity of the rights involved and considering that the practice is "insensitive, demeaning and stupid. . . ." Sala v. County of Suffolk, 604 F.2d at 211.

113. The Supreme Court remanded the case without comment on the retroactive liability argument presented in the Second Circuit opinion. Sala v. County of Suffolk, 446 U.S. 903 (1980).

114. 604 F.2d at 211. The Seventh Circuit, however, might not view the adoption of the strip search policy as an innocent act. That court recently stated that "it does not require a

principle of law was more appropriate.[115] The choice between prospective and retroactive application takes on increased importance because, while there is little precedent to gauge the magnitude of section 1983 judgments for strip search violations, they are expected to be substantial.[116] In addition, the number of people claiming to be victimized in the past few years is growing and could become enormous given the increased likelihood of recovery.[117]

By remanding *Sala*, the Supreme Court has allowed itself an opportunity to study the new standard of municipal liability as it develops in lower courts and gather solid evidence on the impact of retroactive liability for municipal policies suddenly declared unconstitutional. *Sala* could be the vehicle for the return of the retroactive liability issue for the Court's judgment. Because municipalities no longer have good-faith immunity, the Second Circuit will be forced to address the constitutionality of the strip search policy and impose liability if it finds the policy unconstitutional.[118] It must also re-evaluate the strength of its argument for prospective application in light of the Supreme Court's holding in *Owen*. For the moment, however, the *Owen* Court has made it clear that the dignity of constitutional rights must be upheld and the dual purpose of section 1983 must be implemented.

CONCLUSION

The *Owen* decision has guaranteed that a municipality will be liable whenever its customs or policies violate an individual's constitutional rights. Elimination of the good-faith defense provides section 1983 plaintiffs, including strip search victims, with a more realistic chance of recovery. Although this end was accomplished by imposing a stricter standard of liability on local governmental entities, the Supreme Court judged it ultimately fairer to spread the loss among the taxpayers, whose representatives caused the in-

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constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." The court observed that the officials' conduct "exceeded the 'bounds of reason' by two and a half country miles." Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980).

115. 604 F.2d at 211.

116. Although injunctive relief is often adequate and would be a lesser burden on taxpayers, the strip search cases do not lend themselves to this type of remedy. *See generally* Comment, *Injunctive Relief Against Municipalities Under Section 1983*, 119 U. PA. L. REV. 389 (1970).

117. The American Civil Liberties Union estimated that the number of women who were victims of strip searches in Chicago during the five-year period before the police department changed its policy may number 10,000. Tybor, *supra* note 105, at 10, col. 4.

118. The Second Circuit maintained that its resolution of the non-constitutional immunity issue, denying recovery because of the county's good faith, made it unnecessary to decide whether the county's strip search policy was unconstitutional. The elimination of the defense in *Owen* will also eliminate the Second Circuit's justification for avoiding the constitutional issue presented. 604 F.2d at 209 n.1.

jury, than to deny a remedy to a victim of unconstitutional conduct. This higher standard of liability has placed upon municipalities a responsibility to spread the loss that will not always correspond to their degree of fault. The lower courts' disposition of pending strip search cases may prompt the Supreme Court to adjust municipal liability if it becomes devastating, but only if the adjustment can be accomplished without denying the injured individual a remedy. Although only time will tell whether *Owen* represents the best balance between individual rights and governmental discretion, the Supreme Court has made it clear that fiscal considerations will not take priority over constitutional mandates.

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